UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIDWEST TELEVISION, INC.,
d/b/a KFMB STATIONS

and

AMERICAN FEDERATION OF TELEVISION
AND RADIO ARTISTS, SAN DIEGO LOCAL

Cases 21-CA-34683
21-CA-34803
21-CA-34833
21-CA-35029-2

Robert MacKay, Esq., of San Diego, California,
for the General Counsel.

Diane Richard, Esq., of San Diego, California,
for the Charging Party.

Theodore R. Scott, and Edward Cramp, Esqs.,
of San Diego, California, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at San Diego, California, on various dates from March 31, 2003, to May 1, 2003, upon the General Counsel's consolidated complaint which principally alleged that in 2001 the Respondent did not bargain in good faith with the Charging Party and thereafter unlawfully withdrew recognition of the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. It is also alleged that the Respondent reduced the wages of one employee and terminated another in violation of Section 8(a)(3). And finally, the Respondent is alleged to have committed various violations of Section 8(a)(1) of the Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends it bargained in good faith, but the parties were unable to reach an agreement, following which a majority of the bargaining unit employees presented a petition stating they no longer wished to be represented by the Charging Party.

Upon the record as a whole,[1] including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. Jurisdiction

The Respondent is a Delaware corporation engaged in the business of operating radio and TV stations in San Diego, California. In the conduct of this business the Respondent annually derives gross revenues in excess of $100,000, sells time for commercial advertising to advertisers of national brand products, and purchases and receives at its San Diego facility goods valued in excess of $50,000 from enterprises located within the State of California, each of which other enterprises had received these goods directly from points outside the State of California. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

The Charging Party, American Federation of Television and Radio Artists, San Diego Local (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Brief Overview.

The operative facts in this matter are largely undisputed. For many years the Union has represented a unit of the Respondent's employees defined as follows:

> All staff announcers, newspersons and free lance performers employed at KFMB Stations, located at 7677 Engineer Road in San Diego California; excluding guards and supervisors as defined in the Act.

And, the parties negotiated a series of collective bargaining agreements, the last of which was effective from March 21, 1998, to July 31, 2001.[2] Negotiations for a successor agreement began on April 26 and thereafter, the parties met 20 times, the last meeting occurring on October 9. During this period, the parties presented proposals and counterproposals and there was tentative agreement on some issues; however, they remained apart on basic wages, management rights and union security (all of which will be discussed in more detail below).

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[1] Motions by both the General Counsel and Respondent to correct the transcript in certain respects are granted and made a part of the formal papers as ALJ Exhibits 1 and 2. Respondent's objection to the General Counsel's proposed correction on page 41 is denied.
Counsel for the Respondent also moved to supplement the record by introducing two exhibits which he failed to identify or offer during the hearing, to which Counsel for the General Counsel objected. These documents were available and the individual through which they might have been introduced was called as a witness by the Respondent. I find no basis to grant the Counsel's motion and it is therefore rejected.

[2] All dates are in 2001, unless otherwise indicated.

The General Counsel alleges that the Respondent's bargaining demonstrated an attempt to be rid of the Union as its employees' representative. Counsel for the Respondent stated that this case involves the Union's "efforts to prevent Respondent MIDWEST TELEVISION, INC., d/b/a KFMB STATIONS ("KFMB") from bringing the economics of its operations into line with its San Diego-area competitors." (Brief of Respondent at 1.) In support of this argument, the Respondent contends that it is the only TV/radio station operation in the San Diego market whose employees are represented by a union. Further, a witness for the Respondent stated that the Respondent was on tracks to lose more than $1,000,000 in 2001, thus concessions were necessary.

As will be discussed in more detail below, I reject the Respondent's economic argument as having not been established by credible evidence. To the contrary, evidence offered by the Respondent demonstrates that the matters in issue probably had little to do with the Respondent's bottom line. For example, in his September 19 letter to employees, Station Manager Ed Trimble wrote, "This Company has a well-established tract record of paying employees above scale and <u>above market</u>, not because we have to, but because we are committed to hiring and retaining the best talent." (Emphasis supplied.) Such a statement is at odds with the Respondent's apparent contention that contractual wages kept it from being competitive.

In addition, common in this industry, and practiced by the Respondent with permission of the Union, is to negotiate individual personal service contracts (PSC) with its employees. Thus, again from the brief of Counsel for the Respondent at 7, "Bargaining unit employees' PSCs routinely provide for salary levels and other benefits that are far above the minimums provided by collective bargaining. In fact, several bargaining unit employees enjoy compensation in six and seven figures pursuant to the PSCs (citing transcript references)."

The parties seem to assume, as stated by Counsel for the Respondent in his brief, that "all employees who are paid more than the minimum scale were to have signed PSCs in place." (Brief at 129) However, the overwhelming evidence of record is that employees are routinely paid above scale even without having a PSC. See Trimble's letter, the testimony of Mike Effenberger, Frank Calaifo and Richard Moorten and the Respondent's negotiation proposal that it could "lower an employee's above-scale compensation at any time," subject to the employee's PSC.

A previous case involving these parties was decided by Judge Parke on May 4, 2001,[3] and as of this writing is still pending before the Board on exceptions by both the General Counsel and the Respondent. Some of the issues in that case are similar to issues in this matter; however, Judge Parke's findings and conclusions are not controlling here.[4]

B. Bad Faith Bargaining.

It is alleged in paragraph 10 of the consolidated complaint that the Respondent failed to bargain in good faith during negotiations in 2001 by: 1) presenting "proposals retaining to itself total control over virtually every significant aspect of the employment relationship;" 2) presenting "proposals requiring the Union to abdicate its representational rights and duties;" and 3) threatening "to reduce employee wages, lay off employees, and reduce economic commitments in its proposals, unless the Union accepted the Respondent's proposals." It is further alleged that by its overall conduct, including the allegations above, the Respondent failed to bargain in good faith.

Witnesses for both the Union and the Respondent accuse each other, with some justification, of actions tending to impede the bargaining process, such as canceling scheduled meetings, walking out of meetings, not always being available for a meeting when the other side was, and being uncivil, vague and ambiguous when answering questions. I believe that negotiators for both sides share responsibility for whatever acrimony there may have been during negotiations, however, such behavior does not necessarily imply a determination not to reach an agreement either party. The bickering and accusations, even if true,[5] are irrelevant to the fundamental issue of whether the Respondent's proposals and its actions away from the bargaining table demonstrate bad faith bargaining.

The Respondent's proposals which the General Counsel contends demonstrate an unlawful intent not to reach an agreement will be considered as argued by Counsel for the General Counsel on brief.

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[3] JD(SF)-38-01.

[4] Counsel for the Respondent filed a post-hearing motion to strike portions of the General Counsel's brief which referred to this decision. Counsel for the General Counsel responded arguing that the unfair labor practices found by Judge Parke underlie the refusal to bargain allegations here and I should either wait for the Board to decide that case or issue a provisional decision assuming what the Board's decision will be. I decline to do either. Nor do I grant the Respondent's motion to strike. The references to Judge Parke's decision I consider background, but not evidence of any unfair labor practice here. Further, given my findings and conclusions, Judge Parke's findings would merely buttress the conclusion that the Respondent engaged in bad faith bargaining.

Counsel for the Respondent also objected to certain of the General Counsel's arguments as not being supported by the record and thus should be struck. In effect, the Respondent has submitted a reply brief, which I decline to consider under the guise of a motion to strike.

[5] For instance, the Respondent made a demand on the Union for reports filed by the Union with the Department of Labor. The Union refused on grounds that these are a public record and therefore the Respondent could obtain them from the Department of Labor. It is well settled that notwithstanding availability from other sources, a party must comply with demands for relevant material. *E.g., Watkins Contracting, Inc.,* 335 NLRB 222 (2001).

1. The Management Rights Proposal.

The General Counsel argues that by its Management Rights proposal, the Respondent "sought to retain for itself total control over virtually every significant term and condition of employment, and to strip the Union of having any representational role." I disagree.

While the Respondent's proposed clause is substantially more detailed and inclusive than that set forth in the previous contract, it does not appear to have the impact argued for by the General Counsel. Thus Thomas Doyle, the Union's chief negotiator, testified that the Respondent's proposal was very similar to that in the previous contract; and, the only issues the Union had with the Respondent's proposal related to subcontracting and to the assignment of duties other than those regularly performed by an employee.

Cases are legion holding that the Board will not analyze an employer's particular contract proposal to determine whether it would be "acceptable" to the union. However, if the totality of proposals leads to the conclusion that the employer sought to strip from the union its role as the employees' bargaining representative, then such proposals are evidence of bad faith bargaining. *Public Service Company of Oklahoma (PSO),* 334 NLRB No. 68 (2001). On the other hand, proposing a broad management rights clause, such as the one here, does not itself mean that the employer engaged in bad faith bargaining. *Logemann Bros. Co.,* 298 NLRB 1018 (1990), where the Board found the company had violated Section 8(a)(5) in some respects but declined to find that a broad management rights clause including the right to subcontract was evidence of bad faith.

So it is here. Although subcontracting and assignment of employees to other duties are no doubt significant, I cannot conclude that they rise to the level of stripping from the Union its representational role. I cannot conclude that the Respondent's proposal of an all encompassing management rights clause was evidence of its intent not to reach an agreement.

2. The Zipper Clause.

The Scope of Bargaining clause in the previous agreement stated that each party "agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter covered in this Agreement." The Respondent proposed to delete "covered in" and add: "whether or not specially referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of the parties at the time they negotiated or signed" this agreement. And in the second paragraph, where it is acknowledged that the contract constitutes the entire agreement between the parties and supersedes all prior written agreements, the Respondent proposed to delete "written agreements" and add "agreements and undertakings, oral or written, express or implied, or practices between the Employer and the Union or its employees, and expresses all obligations and restrictions imposed on each of the respective parties during its term."

The Respondent argues that such language was proposed in view of the Board's waiver jurisprudence and wanted to insure that final agreement contained the entire agreement between the parties. The General Counsel argues that such language was meant to be a "sword" to justify unilateral changes the Respondent might want to make midterm and therefore was evidence of bad faith, citing *GTE Automatic Electric Inc.,* 261 NLRB 1491 (1982).

Basically the General Counsel argues that this clause might allow the Respondent to unilaterally change some past practice thus requiring the Union to test the matter with a Board charge. Since the Union suggested no specific past practice it had in mind preserving, and since this is a standard zipper clause, I find the General Counsel's argument too abstract on which to base a finding of Section 8(a)(5).

3. Employees are At-Will.

Apparently the General Counsel argues that the Respondent should have proposed a "just cause" for discharge of employees not covered by a PSC, and its failure to do so is evidence of an intent not to reach an agreement.

There was no "just cause" protection in the previous contract. Indeed, the parties contemplated that employees might be dismissed without "just cause" and therefore provided severance pay for such employees. While the Respondent sought to change some aspects of the severance pay provisions, I cannot conclude that it was also required to offer a "just cause" clause.

Indeed, "just cause" does not even seem an applicable test for these employees. Every member of the bargaining unit is "on the air talent" and therefore, to a large extent, whether a particular employee is doing his job to the satisfaction of management is a matter of subjective evaluation. Management might well determine to discharge a "talent" without there being traditional just cause.

4. The Respondent's proposals on Scale Wages.

In its wage proposal, the Respondent wrote: "The Employer may lower an employee's above-scale compensation to scale at any time." (This would be subject, presumably, an employee's PSC.) This, the General Counsel argues, would give the Respondent "unilateral control and discretion over mid-term wages" and therefore evidences bad faith. I disagree.

As noted above, many, if not most, of the Respondent's unit employees have a PSC which calls for compensation above scale, an others, apparently, are also paid above scale. That employees can negotiate directly with the Respondent for above scale wages has long been established here. What the Union negotiates is a floor. Basically the General Counsel argues, without citation of authority, that absent this proposed language, once the Respondent has agreed with an employee to above-scale wages such could not be reduced. Such is questionable. But beyond that, the proposal that above-scale employees could be reduced to scale does not give the Respondent unilateral control over wages or otherwise demonstrate an intent not to reach an agreement, provided the Respondent does not make the reduction for reasons proscribed by the Act. See Section C, infra.

5. Grievance/Arbitration.

The General Counsel argues that the grievance/arbitration clause proposed by the Respondent evidenced bad faith because the broad management rights clause left nothing to grieve; that the Respondent rejected the Union's proposal that alleged breaches of PSCs be subject to grievance/arbitration; and the start of the limitation period was vague.

Although the Respondent did propose changes in the grievance/arbitration procedure from the previous contract, I find nothing that suggests, as argued for by the General Counsel, that the Respondent's proposal destroys the Union's capacity to resolve disputes on behalf of the employees.

6. Direct Dealing for PSCs.

The General Counsel contents that "Respondent presented proposals that granted itself the unrestricted right to direct deal with employees for PSC's." I reject this contention. In its proposal on Wages, the Respondent sought to codify direct dealing in language identical to that in the expired contract, which includes the employee's right to be represented by the Union during individual negotiations.

Believing that direct dealing might be a permissive subject of bargaining, the Respondent withdrew this language in its final proposal before declaring impasse. Nevertheless, the proposed language and negotiation discussions on direct dealing do not support the General Counsel's argument. As noted above, direct dealing is common in this industry and has been in place here for many years. The Respondent's proposal did not alter this practice. I conclude that the Respondent's proposal on PSCs was not evidence of bad faith.

7. No Strike/No Crossing Picket Lines.

In the 1998-2001 contract, there is a prohibition against strikes and lockouts as well as a proviso that individuals can refuse, without being subject to discipline, to cross primary picket lines. Though the Respondent initially proposed to eliminate this language, along with the picket line language, it subsequently included the no strike/no lockout proscriptions. The Union agreed to this language, with the deletion of the picket line portion. The General Counsel does not argue that deleting the picket line language was evidence of bad faith. Accordingly, I will make no finding concerning the picket line proposal. As to the no strike language, I conclude it is identical to that in the previous contract does not evidence bad faith and in fact the Union agreed to it.
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8. Respondent's Proposal to Eliminate Union Security.

Requiring employees to join and maintain membership in the Union after employment for 30 days has been codified in the parties' previous contracts. The Respondent proposed to eliminate this requirement – to the point of impasse. A union security provision, such as the one in the parties' previous contract, is so common and well established that a proposal to eliminate such a clause can only be viewed as "anti union" and for the purpose of weakening the Union. Notwithstanding that some of the Respondent's employees might themselves be "anti-union" the Respondent's proposed elimination of union security is clearly evidence of bad faith – evidence that the Respondent was determined not to reach an agreement.

It is true, as the Respondent contends, that just because there was a union security clause in previous contracts it was not required to accept one in the successor. *Cook Bros. Enterprises, Inc. d/b/b Challenge – Cook Brothers.,* 288 NLRB 357 (1988). In arguing for removal of the union security clause, the Respondent contended it did not want to be forced to remove on-the-air talent, such as Rick Roberts (who was vocally anti-union and objected to paying dues). However, the fact that the Respondent would not consider the Union's proposal that employees would not be removed from the air suggests that its claim is specious. *E.g., Mar-Len Cabinets, Inc.,* 243 NLRB 523, 536 (1979).

In fact, I conclude that union security is so important to the Union that once established the Union would not reasonably abandon it, any more than it would abandon a wage scale and agree to start over from scratch. And this the Respondent's seasoned negotiators would know. Thus the Respondent would know that the Union could not accept a contract providing for the elimination of union security.

In sum, though most of the Respondent's proposals were not so unreasonable as to support a finding of bad faith in negotiations, its adamant insistence (to impasse) on deleting union security demonstrates such bad faith.

C. Richard Moorten Allegations.

Richard Moorten began working for the Respondent on March 19 at the above scale wage of $17.30 per hour (scale being $14.32 which Moorten testified he would not accept). Within a few days Moorten was presented with a PSC, which he neglected to sign and in fact did not do so until August – shortly after the July 31 deadline for PSCs set by the Union.

On September 19, Station Manager Ed Trimble sent a memorandum to all employees in which he stated, in relevant part: "First and foremost, if you are reduced to scale, it will be because of AFTRA'a bargaining tactics. . . . * * * AFTRA is again interfering with our ability to pay current employees or new hires more than the Union contract rate. Already we have had to reduce one current AFTRA member to scale and one 'new hire' could not be hired above scale or given a contract. * * * Why don't you ask AFTRA for the truth about what really happened with Hal? Hal and 19 other employees were reduced to scale. Many employees immediately joined those coworkers who had already resigned from the Union and informed KFMB that they no longer wanted AFTRA to represent them."

According to the Respondent, since Moorten was receiving above scale wages without having signed a PSC, he was reduced to scale. The Respondent also argues that the fact Moorten was paid above scale without a PSC was clerical error not known to management – a contention beyond belief. As noted above, employees are routinely paid above scale without a PSC and in any event, managers are presumed to know how much they pay employees, and under what circumstances.

The issue is whether reducing Moorten's wage rate was violative of Section 8(a)(5) and/or violative of Section 8(a)(3). In a similar situation involving employee Hal Clement, Judge Parke found that receiving above-scale wages was not a mandatory subject of bargaining, thus for his wage rate to be reduced was not violative of Section 8(a)(5); however, in his case, the reduction was inherently discriminatory within the meaning of *NLRB v. Great Dane Trailers,* 388 U.S. 21 (1967). Both conclusions are before the Board on exceptions.

Since the Board will decide whether unilaterally reducing one's above-scale wage rate is a violation of Section 8(a)(5), I will not rule on that issue as to Moorten. I do, however, conclude that reducing his wage rate during the course of collective bargaining for the purpose of undermining the Union was violative of Section 8(a)(3). The Respondent, of course, was not required to reduce Moorten's wage rate, but choose to do so in the context of negotiations for a new collective bargaining agreement and then put the blame on the Union.

While Moorten is not specifically named in Trimble's September 19 letter to employees, his situation was. Since the Respondent was not required to reduce Moorten's wage rate, in doing so and blaming the Union, the Respondent clearly violated Section 8(a)(3). It is clear from Trimble's letter that the Respondent reduced Moorten's wage rate, and threatened others with like fate, in order to undermine the Union. Such was inherently destructive of Section 7 rights therefore a violation of Section 8(a)(3). The import of the letter threatened other employees in violation of Section 8(a)(1).

Finally, it is undisputed that the Respondent reduced Moorten's wage rate without notice to, or consultation with, the Union. Whether it thereby violated Section 8(a)(5) will depend on the Board's ruling in the previous case and I make no conclusion concerning that issue here.

D. Mike Effenberger Discharge.

Mike Effenberger was a fill-in announcer from 1995 until his discharge in November 2001.[6] He had just finished a week of fill-in work for the morning show when Dave Sniff, the program director, called Effenberger into his office and said "that he had to fire me at that point in time." Effenberger also testified that Sniff "told me that he was – they were eliminating bargaining units." And, "(w)e discussed a little bit that there was an ongoing negotiation with AFTRA and the station, that was the reason why this was occurring." Sniff assured Effenberger that the discharge had nothing to do with his performance.

Sniff testified that he was instructed by his boss, Tracy Johnson, "that we needed to make this move (discharging Effenberger), and what ever the timetable was to make it in." Sniff denied discussing the AFTRA negotiations with Effenberger. He further denied telling Effenberger that Ed (Trimble) said to terminate him, that "Ed is terminating the bargaining unit," that "Ed wanted to terminate the bargaining unit employees," or that "Ed wants to get rid of some of the people in the bargaining unit," none of which Effenberger testified to on direct. The denials elicited from Sniff were similar to, but not really the same as Effenberger's assertions.

Sniff testified that he told Effenberger that his discharge was one of the ways the Respondent was attempting to reduce costs. He also said that fill-in work would be done by Rick Roberts – one of the Respondent's "stars," vocally anti-union and very high paid.

Although asserting, as with other issues, that discharging Effenberger was a cost cutting measure, the Respondent offered no real proof as to how discharging a part-time fill-in employee and replacing him with a very high paid employee saved money. Further, Effenberger continues to be employed by the Respondent, but as an "independent contractor."

On the other hand, lending support to the conclusion that Effenberger was discharged because of his membership in the Union is the testimony of Frank Catalfo. Catalfo testified that for about 10 years prior to April 30, 2001, when he entered into a one year PSC, he had not worked under a PSC. Shortly before accepting a PSC, Sniff "told me that General Manager Ed Trimble wanted Dave (Sniff) to single out a few key employees to protect in the near future when Ed Trimble may bring certain employees down to scale. So Dave Sniff could single out a few employees to protect." Catalfo further testified that Sniff told him, "that Ed Trimble was out to make the union go away, to break the union, were his exact words. He said he was quite sure it was going to happen this time."

While these statements, which I credit, were not offered as violations of the Act, being barred by Section 10(b), I do find that Catalfo's testimony supports the conclusion that Effenberger was discharged in violation of Section 8(a)(3).

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[6] He also did some work as an image announcer, which is non-bargaining unit work. The complaint alleges the discharge on October 19. The parties seem to agree it was in November.

On balance, I credit Effenberger and conclude that his discharge related to the AFTRA negotiations and the Respondent's withdrawal of recognition (infra). Thus I conclude that the Respondent violated Section 8(a)(3) of the Act, and I specifically discount the Respondent's assertions as not being supported by credible evidence.

The statement by Sniff that the Respondent was eliminating "bargaining unit" along with his statement that this had to do with ongoing negotiations was alleged as a threat in violation of Section 8(a)(1). I credit Effenberger and conclude that Sniff made statements along these lines and therefore violated Section 8(a)(1).

E. Threat by Tom Warren.

For many years until his resignation on October 26, Jim Blankinship worked as a photographer. His immediate supervisor was Earle Thomas (Tom) Warren, Jr. In 1986 Blankinship was also given a part-time bargaining unit position as the "unknown eater" doing two segments a week. On May 8 he was told that as of May 31, the "unknown eater" would be cancelled as a cost savings measure.

Around May 9, Blankinship told Warren the "unknown eater" had been cancelled and asked him, in effect, what Warren knew. Warren said he did not know anything about the union jobs but further said, "hopefully I would not be on Ed Trimble's radar any more now that the eater segment had been cancelled." Warren testified that he "absolutely" did not make such a statement.

The problem with this allegation is that both Blankinship and Warren seemed quite credible and each gave persuasive testimony. Since Warren supervised employees who are not in the bargaining unit, and had no dealings with AFTRA or the negotiations, there is no context for the statement attributed to him. Nor is there documentary or other evidence which would tend to support Blankinship. Such does not mean that Warren did not make the "radar" statement. But given the standoff in credibility and lack of other evidence, I conclude that the General Counsel failed to establish by a preponderance of credible evidence the factual basis for this allegation. Thus even if the "radar" statement can be considered some kind of a threat, I conclude that paragraph 15 of the complaint should be dismissed.

F. Withdrawal of Recognition.

From September 4 through October 20, 25 bargaining unit employees (including two independent contractors) signed a decertification petition, which the parties stipulated constituted a majority of the bargaining unit (though the size of the unit is unclear in the record). Accordingly, on October 30, the Respondent withdrew recognition from the Union and cites *Levitz Furniture*, 333 NLRB 105 (2001) and *Littler Diecasting Corp,* 334 NLRB 707 (2001), as its authority to do so. The General Counsel contends that the petition was tainted since there were unremedied unfair labor practices (here and from the previous case). Therefore, the withdrawal of recognition was unlawful.

The Respondent argues that not all unfair labor practices taint such a petition, citing *Lee Lumber & Building Material Corp.,* 322 NLRB 175 (1996), and argues that the General Counsel failed to prove that any of the unremedied unfair labor practices affected any signature. Indeed, the Respondent called as witnesses 21 of these signatories (including the two independent contractors) who testified that the Respondent's acts, including reducing the wage rate of

Clement and Moorten and failing to arrive at a contract, did not affect their decision to sign the petition. They gave various reasons for signing the petition, principally among them that the Union was not representing them well and that Doyle was incompetent.

In *Miller Waste Mills, Inc., d/b/a RTP Company,* 334 NLRB 466, 468 (2001), the Board reiterated its long-held policy "that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." In that case the Board went on to note that it has considered several factors in analyzing whether a causal connection existed between the unremedied unfair labor practices and the employees' dissatisfaction as demonstrated by their signing a petition. These factors, set forth in *Master Slack Corp.,* 271 NLRB 78 (1984), include: "(1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violations to cause employee disaffection; and, (4) the effect of the unlawful conduct on employees' morale, organizational activities, and the membership in the union."

While the General Counsel does have the burden of establishing a casual connection between the unremedied unfair labor practices and the petition to withdraw recognition, this, I conclude, can be satisfied by evaluating the objective evidence. The Respondent seems to argue that the General Counsel's burden can be satisfied only by the subjective testimony of petition signers. I disagree. In *Master Slack* the Board did accept the testimony of petition signers to the effect that the prior unfair labor practices did not affect their decision. However, such was in the context of that case where unfair labor practices had occurred years previously and for the most part had been remedied, the company continuing to litigate only backpay.

I conclude that the objective evidence here is ample to support the conclusion that the employees' petition was tainted by the Respondent's unremedied unfair labor practices. I conclude that the nature of the violations here, particularly reducing employees to scale during bargaining and blaming the Union, has a tendency to cause employee disaffection and would negatively affect employee morale. Indeed, in his September 19 letter, Trimble acknowledged that such caused employees to sign the petition to withdraw recognition of the Union. Finally, the Respondent's adamant refusal to include, as had always been the case, a union security cause clearly was clearly aimed at reducing the Union effectiveness as the employees' bargaining representative.

I therefore conclude that the Respondent unlawfully withdrew recognition from the Union and I shall recommend and appropriate order reestablishing the bargaining relationship.

G. Actions by Graig Schloss.

Graig Schloss is an attorney and represented the Respondent during the time of the events in this matter and in negotiations. He subsequently moved on and is not involved in this proceeding except having appeared as a witness for the Respondent.

It is uncontested that employee Brian Wilson received an investigative subpoena with a return date of January 9, 2002; and that prior to that date Wilson was instructed by Sniff to come to work early one day in January and meet with Schloss.

Wilson met with Schloss in the Respondent's conference room at which time Schloss "told me that he was representing some other people that had been subpoenaed and if I would like his representation from a legal standpoint KFMB was making him available to me." Further, Schloss asked "what I thought I was being subpoenaed for and I kind of gave him some explanations as to why I thought I could have been subpoenaed." The essence of Wilson's testimony is undenied.

In *S.E. Nichols, Inc.,* 284 NLRB 556 (1987), enfd. on this issue, 862 F.2d 952 (2d Cir. 1988), the Board adopted the conclusion of the judge that the employer violated Section 8(a)(1) by offering employees who had been subpoenaed by the General Counsel the services of its attorney. As the Board noted, certain circuit court decisions finding no violation where counsel had been suggested (and cited here by the Respondent) are distinguishable. While much of the judge's analysis concerned whether employees in such a situation would have the right to counsel (an issue not involved here), the judge concluded that offering the services of the employer's counsel in an investigation of the employer posed an inherent conflict of interest. Here, as in *Nichols*, company counsel was offered to Wilson, thus "temptingly proposing a serious conflict of interest." Id at 559, n. 9.

Counsel for the Respondent seems to argue that it is permissible for an attorney for one party to litigation to represent a potential witness for an adverse and to solicit such representation. And, as are the facts here, offer the benefit of free legal services. I reject theses contentions.

While an attorney might, under certain circumstances not apparent here, represent both a party to litigation and a potential witness for the other side, to solicit such representation is certainly questionable.[7] Although such issues are not for the Board to decide, under these circumstances, including offering the benefit of free legal advise, I conclude that Schloss attempted to interfere with the Board's investigation, its processes and ultimately employees' rights under Section 7 of the Act.

Cases cited by the Respondent are distinguishable and do not exonerate Schloss' conduct. To the contrary, in *Baptist Medical Center,* 338 NLRB No. 38 (2002) the Board reiterated its policy of finding an 8(a)(1) violation where the company tells employees that it would furnish an attorney, if requested, during a Board investigation.[8] In that case, however, the Board concluded this had not occurred. While the company's first letter to employees referred to a Department of Justice investigation, but seemed also to suggested to them that if contacted by a Board investigator or subpoenaed the company wanted to know and would furnish them an attorney. Shortly thereafter the company sent employees a second letter clarifying that the first letter did not apply to the then ongoing Board investigation.

Though Schloss' interrogation of Wilson might generally have been permissible under the rule of *Rossmore House,* 269 NLRB 1176 (1984) it fails the test of *Johnnie's Poultry,* 146 NLRB 770 (1964), enfd. denied, 344 F.2d 617 (8th Cir. 1965), a long-term, well established rule. Thus in *Freeman Decorating Co.,* 336 NLRB 1 (2001), enfd. denied on other grounds, 334 F. 2d 27 (DC Cir. 2003), the Board said it "has generally taken a bright-line approach in enforcing the requirement established in *Johnnie's Poultry,* 146 NLRB 770, 774-776 (1964), that an employer interrogating an employee witness in preparation for a Board hearing must give explicit assurance against reprisal for refusing to answer or for the substance of any answer given. We established this requirement to ensure that employers' legitimate interest in obtaining relevant evidence will not encroach on employees' rights to protection under Section 7." 336 NLRB at

[7] See Rule 3-310 of the California Rules of Professional Conduct; San Diego Bar Assn. Ethics Opinion 1974-21.5.

[8] The Fifth Circuit declined to enforce a Board order for such a violation. *Florida Steel Corp.,* 587 F2d 735 (5th Cir. 1979).

14. Schoss did not give such assurances here. Therefore, his interrogation of Wilson was violative of Section 8(a)(1).

IV. Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Mike Effenberger to his former job, or if that job no longer exists, to a substantially equivalent position of employment and make him, and Richard Moorten whole for any loss of earnings and other benefits they may have suffered in accordance with the provisions *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

ORDER

The Respondent, Midwest Television, Inc., d/b/a KFMB Stations, its officers, agents, successors and assigns shall:

1. Cease and desist from:

    a. Reducing employees above-scale wages in order to affect employee rights to be represented by the Union.

    b. Discharging an employee in order to dissipate employee support for the Union.

    c. Refusing to bargain with the Union as the duly designated representative of its employees in the appropriate bargaining unit by entering into negotiations with an intent dissipate the Union’s status as the employees’ bargaining representative.

    d. Withdrawing recognition from the Union while there are pending unremedied unfair labor practices tending to undermine the Union’s status as the employees’ bargaining representative.

    e. Threatening employees with reduction in their wages in order to undermine the Union’s status as the employees’ bargaining representative.

    f. Offering representation by the Respondent’s counsel to employees who had been subpoenaed during a Board conducted investigation.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

g. Interrogating employees through Respondent attorneys without giving appropriate assurances that they would not be discriminated against in any way.

h. In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

a. Recognize and bargain with the Union as the duly designated representative of its employees in the below described bargaining unit, and if an agreement is reached, embody same in a written, signed, contract. The appropriate bargaining unit is:

> All staff announcers, newspersons and free lance performers employed at KFMB Stations, located at 7677 Engineer Road in San Diego, California; excluding guards and supervisors as defined in the Act.

b. Offer Mike Effenberger reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position and make him and Richard Moorten whole for any losses they may have suffered as a result of the discrimination against them, in accordance with the Remedy Section above

c. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

d. Within 14 days after service by the Region, post at it facility in San Diego, copies of the attached notice marked “Appendix.”[10] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

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[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

e. Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

f. All allegations not specifically found herein to be unfair labor practices are dismissed.

Dated, San Francisco, California, February 25, 2004.

____
James L. Rose
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT reduce employees' above-scale wages in order to affect employee rights to be represented by the Union.

WE WILL NOT discharge an employee in order to dissipate employee support for the Union.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of its employees in the appropriate bargaining unit by entering into negotiations with an intent dissipate the Union's status as the employees' bargaining representative.

WE WILL NOT withdraw recognition from the Union while there are pending unremedied unfair labor practices tending to undermine the Union's status as the employees' bargaining representative.

WE WILL NOT threaten employees with reduction in their wages in order to undermine the Union's status as the employees' bargaining representative.

WE WILL NOT offer representation by the Respondent's counsel to employees who had been subpoenaed during a Board conducted investigation.

WE WILL NOT interrogate employees through our attorneys without giving appropriate assurances that they would not be discriminated against in any way.

WE WILL NOT in any other manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Richard Moorten and Mike Effenberger for any loss of wages or other benefits they may have suffered as a result of our discrimination against them, with interest.

MIDWEST TELEVISION, Inc.,
d/b/a KFMB STATIONS

____
(Employer)

Dated ________________ By _______________________________________
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.